UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

CAPITOL RECORDS INC.; SONY BMG MUSIC ENTERTAINMENT; ARISTA RECORDS LLC; INTERSCOPE RECORDS; WARNER BROS. RECORDS INC.; and **UMG RECORDINGS INC.**, *Plaintiffs*, v. **JAMMIE THOMAS**, *Defendant*.	Case No. 06-cv-1497 (MJD/RLE) JURY DEMANDED

RESPONSE TO MOTION IN LIMINE TO PRECLUDE FAIR USE DEFENSE

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Jammie Thomas has and has claimed the right recognized by the Supreme Court in *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1980), to trial by jury of the copyright-infringement claims against her. She will defend before the jury against the charges of infringement on the ground, among others, that her use in the context of its time — and of the almost incomprehensibly severe penalties that the Copyright Act attaches to the conduct of which she stands accused — was fair.

Fairness borders infringement. In *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), the Supreme Court made proof that a noncommercial use is unfair part of the plaintiff's affirmative case — what must be proved to show infringement. "[O]ne who makes a fair use of the work is not an infringer of the copyright with respect to such use." *Id.* at 433. "Moreover, the definition of exclusive rights in § 106 of the present Act is prefaced by the words 'subject to sections 107 through 118.' . . . The most pertinent in this case is § 107, the legislative endorsement of the doctrine of 'fair use.'" *Id.* at 448. A use is not copyright infringement unless it is unfair.

As the courts developed the fair-use doctrine, they often failed to distinguish the question whether a defendant's conduct constituted "fair use" from the question whether it infringed the plaintiff's copyright. *See, e.g., Folsom v. Marsh*, 9 F. 342, 345, 348–49 (C.C.D. Mass. 1841) (No. 4901) (holding that some activities inconsistent with the terms of the copyright statute nevertheless constitute "fair and bona fide abridgment[s]" or "justifiable use[s]" and therefore do not give rise to liability); *Lawrence v. Dana*, 15 F. 26, 60 (C.C.D. Mass. 1869) (No. 8136); *Nichols v. Universal Pictures Corp.*, 45 F.2d

119, 121 (2d Cir. 1930), *cert. denied*, 282 U.S. 901 (1931); *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 54 (2d Cir. 1936), *cert. denied*, 298 U.S. 669 (1936); *Twentieth Century Fox-Film Corp. v. Stonesifer*, 140 F.2d 579, 582 (9th Cir. 1944).

In a noncommercial case like this one, the presumption is that the defendant's use is fair use and it is for the plaintiff to prove the contrary. The Supreme Court, applying this rule in *Sony*, held:

> If the Betamax were used to make copies for a commercial or profit-making purpose, such use would presumptively be unfair. The contrary presumption is appropriate here, however, because the District Court's findings plainly establish that time-shifting for private home use must be characterizes as a noncommercial, nonprofit activity.

Id. at 449. Jammie asserts the defense of fair use not as an affirmative defense — "I committed copyright infringement, but . . ." — but as a direct defense. She claims that the noncommercial acts of which she stands accused are not copyright infringement because the plaintiffs cannot overcome the presumption that they were fair. Although many cases from lower courts have casually described fair use as an affirmative defense, the holding in *Sony* remains good law.

Neither *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994), nor *Harper & Row, Publishers v. Nation Enterprises*, 471 U.S. 539 (1975), the two cases in which Plaintiffs contend that the Supreme Court overruled its holding in *Sony* creating the presumption of fair use in noncommercial cases, *see* M. at 4–5, involved a noncommercial infringement. *Campbell* considered "2 Live Crew's commercial parody of Roy Orbison's song, 'Oh, Pretty Woman'"; indeed, the very issue the Court was called on to decide was whether "the defense of fair use [was] barred by the song's commercial character." *Campbell*, 510 U.S. at 571–72. Similarly, *Harper & Row* concerned the unauthorized publication by a magazine of excerpts from President Ford's unpublished manuscript of his memoirs, a commercial use. *Harper & Row*, 471 U.S. at 542. Neither case expressly overruled *Sony*, and neither could have done so implicitly because neither concerned noncommercial infringement.

Plaintiffs' contention that Jammie was somehow bartering illegal songs with other users through KaZaA, M. at 6, is entirely unsubstantiated. "A person who engages in file-sharing does so with the expectation of receiving copyrighted works in return and, thus, does so for financial gain." It is undisputed that a user of KaZaA can download songs without sharing any songs in return. This is what MediaSentry claims it did. It is undisputed, too, that there is no deal between the users of KaZaA requiring reciprocal sharing. Plaintiffs resort to this strained argument because they realize that if "noncommercial" means anything at all, it covers a case like this, where Jammie sold nothing, marketed nothing, advertised nothing, but, at worst, made and shared personal copies, receiving not a nickel in return.

Fairness is a standard, not a rule. Fairness is not legally defined as a rule. No simple definition of fair use can be fashioned; no bright-line test for fair use exists. *See* Fisher, *Reconstructing Fair Use*, 101 Harv. L. Rev. 1661, 1662 (1988); Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1110 (1990). The fair-use doctrine, which § 107 codifies, is the precipitate of a series of judicial decisions, beginning in the mid-nineteenth century, in which federal courts held that conduct seemingly proscribed by the copyright statute in force at the time did not give rise to liability.

In 1976, when Congress overhauled the Copyright Act, it acceded to this emergent view and, in § 107, acknowledged and lent its approval to the fair-use doctrine. Congress's purpose was neither to alter not to "freeze" the doctrine as it had been developed by the courts, but simply to legitimate it. *See* H.R. Rep. No. 1476, 94th Cong., 2d Sess. at 66 (1976) ("The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change."); S. Rep. No. 473, 94th Cong., 1st Sess. at 62 (1975). As § 107 provides, the four factors there identified are a required part of the fair-use analysis, but not its end.

The only case that Plaintiffs cite for the proposition that "[f]air use . . . must fall within the narrow confines of the statutory exception," M. at 3, says nothing of the sort. Plaintiffs cite page 590 of *Campbell*, a page that discusses and applies the fourth factor identified in the statute but says nothing at all even related to the proposition for which Plaintiffs cite the case, namely, that fair use is somehow limited to the factors identified in § 107. To the contrary, as the Supreme Court held in the same case:

> The task is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis. The text employs the terms "including" and "such as" in the preamble paragraph to indicate the "illustrative and not limitative function of the examples given, which thus provide only general guidance about the sorts of copying that courts and Congress most commonly had found to be fair uses.

Id. at 577–78.

One relevant factor to be considered in this case is the amount of damages that Plaintiffs seek here and have sought against more than 35,000 other individuals around the country. In deciding whether the conduct of which Jammie stands accused falls inside or outside the borders of copyright, the jury should consider the consequences that would attach, not only for Jammie, but for all others in her position, if the law is that this conduct constitutes copyright infringement punishable by statutory damages of $150,000 per work — $3.6 million in this case.

To make the point starkly, if the arguments advanced by the plaintiffs in this case are correct, then they could pursue not just the $3.6 million that they have decided to seek, but $150,000 for each of the more than 1700 copyrighted recordings that they found on Jammie's computer, for a grand total of more than $250,000,000 — a quarter of a billion dollars against an individual for downloading and sharing songs online. The jury has the right to conclude that, in the context of the penalties imposed by the Copyright Act, the conduct of which Jammie is accused falls on the fair-use side of the line.

It makes no difference what factual fair-use findings various courts have made in other equitable and jury-waived contexts. The particular facts of those other cases will not be before Jammie Thomas's jury. Nor did those decision-makers have occasion to consider the arguments that we plan to advance. The nature of the fair-use standard is such that juries necessarily decide each case on the argument and evidence there presented. And Plaintiffs, who have been litigating the same case around the country for more than five years, can hardly claim prejudice from Jammie's assertion of her right to submit fair use to the jury.

Respectfully submitted,

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